IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1821

UNITED STATES OF AMERICA,

Petitioner,

—vs.—

SYLVIA L. MENDENHALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

CHARLES S. SIMS
BRUCE J. ENNIS, JR.
EDNA D. WELLS
HELENE M. FREEMAN
c/o American Civil Liberties Union Foundation, Inc.
22 East 40th Street
New York, New York 10016

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Page

Page

Other Authorities: Page

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1821

UNITED STATES OF AMERICA,

Petitioner,

-v.-

SYLVIA L. MENDENHALL,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus */

For over 59 years, the American Civil Liberties Union has been dedicated to the protection and preservation of

---

*/ The parties have agreed to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court pursuant to Rule 42(2).

the civil liberties of the American people through a vigorous defense of the safeguards embodied in the Constitution.

The present case is of particular interest to the ACLU because the issues presented concern the continued integrity of a fundamental constitutional provision, the Fourth Amendment right of the people to be free from unreasonable searches and seizures. The indiscriminate use of the "drug courier profile" poses a substantial threat to that right.

The hallmark of our criminal justice system is its concern with the culpability of the individual. Use by law enforcement officials of non-individualized "profile" characteristics to support investigatory stops for questioning, runs counter to this precept of individual culpability.

In Torres v. Puerto Rico, the ACLU urged the invalidity of a statute which authorized the random, indiscriminate searches of personal belongings of persons entering Puerto Rico from the United States. And in Delaware v. Prouse, the ACLU successfully argued the unconstitutionality of police

stops made neither for articulated reasons nor pursuant to specific guidelines and discretion-free standards.

The ACLU has repeatedly urged upon this Court a "strict construction" of the Fourth Amendment. The government seeks to remove from the protections of that Amendment the privacy of the hundreds of thousands of persons utilizing our nation's airports. It is the purpose of this amicus brief to demonstrate that the applicability of a "drug courier profile" cannot, without more, justify a sufficiently reasonable suspicion of criminal activity to authorize the discretionary stopping and questioning of an individual who meets that profile.

STATEMENT OF THE CASE

Amicus adopts and relies on the statement of the case set out in respondent's brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly affirmed the constitutional principle that the Fourth Amendment protects individuals from being stopped and questioned, except with consent or upon a reasonable and articulable suspicion of criminal activity. Brown v. Texas, 61 L Ed 2d 357 (1979); Delaware v. Prouse, 59 L Ed 2d 660 (1979); Terry v. Ohio, 392 U.S. 1 (1967); Cf. Ybarra v. Illinois, 48 U.S.L.W. 4023 (November 28, 1979). In contrast to other, less free societies which do not value the right to be let alone, and where questioning by police officers with broad, standardless, discretion is commonplace, 1/ the Fourth Amendment permits such questioning only where it is objectively reasonable, after giving due regard to the individual's right of privacy. See generally Delaware v. Prouse, supra, at 667.

1/ Consider the South African police practice reported in the New York Times, January 23, 1966.
(footnote continued on next page)

Petitioner, the United States, disputes the applicability of the "reasonable suspicion" standard in the circumstances of this case, arguing that brief questioning of individuals suspected of being drug couriers does not implicate any interests protected by the Fourth Amendment, and thus, presumably, can be conducted on a wholly arbitrary basis. Perhaps in recognition of the weakness of

---

(footnote continued from previous page)

> "Johannesburg, Jan. 22 - The police in Johannesburg have hit on an efficient, if crude, way to reverse an alarming rise in armed robberies in the city; to treat every black man as a criminal suspect."
>
> This is done by saturating a prescribed area with policemen under orders to check the 'reference books' - the passports all blacks must carry in "white" areas - of every African they encounter... The undeniable success of the raids shows that it is not a fantastic notion for the white authorities to find a suspicion of criminality in a black skin - an indication of the extent to which this is a society at war with itself."

this argument which has been rejected in at least seventeen lower court decisions (see note 9, infra), petitioner contends, in the alternative, that the "reasonable suspicion" standard is met whenever an individual exhibits one or more of the characteristics of an unwritten, constantly changing, and unvalidated "drug courier profile". This "profile" is already in use in over 25 metropolitan airports (Gov't. Br. 2) and the government forthrightly admits that it intends to extend the use of similar profiles to other contexts (Pet. for Cert. 11 n.12).

The stopping and questioning of respondent was a "seizure" within the meaning of the Fourth Amendment. Accordingly, it was unlawful absent facts which created a reasonable suspicion that respondent was engaged in criminal activity. See, e.g., Delaware v. Prouse, supra; Terry v. Ohio, supra; Brown v. Texas, supra. Cf. Ybarra v. Illinois, supra. (Point I). Based on the essentially undisputed facts, it is clear that at the time she was stopped, the federal

officers did not have reasonable suspicion. The practice the government asks this Court to approve - the use of a "drug courier profile" to justify stopping and questioning individuals - is simply an attempt to circumvent the Fourth Amendment requirement of reasonable suspicion. (Point II).

Finally, the "primary illegality" of the initial stopping and questioning having been established, evidence seized during the associated strip search of respondent's person must be suppressed. The alleged consent relied on by the government was not voluntary within the meaning of Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

In any event, the primary illegality is so closely tied to that search in time and circumstance that the taint was not sufficiently attenuated to preclude suppression, even if there were consent. (Point III).

I. THE INVESTIGATORY STOPPING AND QUESTIONING OF RESPONDENT WAS A SEIZURE REQUIRING REASONABLE SUSPICION UNDER THE FOURTH AMENDMENT.

Resolution of this issue is controlled by this Court's recent and unanimous decision in Brown v. Texas, 61 L.Ed. 2d 357 (1979). There, the Court squarely held that when police officers stop and question an individual, even if only for the limited purpose of requiring him to identify himself, they perform a "seizure" subject to the requirements of the Fourth Amendment. Id. at 361. Here too, "officers detained [respondent] for the purpose of requiring [her] to identify [herself]", and accordingly, "they performed a seizure of [her] person subject to the requirements of the Fourth Amendment." Id.

Although simple stopping and questioning is not ordinarily sufficiently intrusive to require "probable cause", it sufficiently implicates interests protected by the Fourth Amendment to require at least a "reasonable suspicion" of criminal activity. Brown v. Texas, supra, at 362. Thus it is settled under Brown v. Texas that a "seizure" has occurred,

within the meaning of the Fourth Amendment, even if the individual has not been "arrested", and even if the only thing "seized" is identificatory information. Of course, a "seizure" does not occur everytime a police officer attempts to question an individual. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). But unless it would be clear to the individual from the circumstances that the individual is entirely free to ignore the officer and proceed on his way, stopping and questioning will constitute a "seizure" within the meaning of the Fourth Amendment. Brown v. Texas, supra; Sibron v. New York, 392 U.S. 40, 63 (1968); Terry v. Ohio, supra, at 19 n.16; Delaware v. Prouse, supra, at 667-8; United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

It will always be difficult for courts to weigh after the event all of the subtle nuances of attitude, tone of voice, facial gestures, etc., from which the individual must conclude whether he or she is free to

ignore an officer's questioning. 2/ But it is not unfair to resolve doubts on that issue against the officers, for they have it entirely within their power to dispel any apprehension of coercion or necessity to respond simply by stating, at the outset, that the individual is entirely free to ignore the questions, and will not be detained. That simple statement was not made in this case.

Furthermore, it is obvious that respondent did not feel free to ignore the questions. Why would respondent, who was in fact concealing contraband, answer questions about her identity and travel plans, and thereafter "consent" to a search of her person which she knew would reveal the contraband, if she felt entirely free to ignore those questions and to refuse that search? Regardless of whether as a matter of law she was re-

---

2/ Petitioner suggests, for example, that whether the event is or is not a "seizure" may depend on "use of tone of voice or language indicating a demand, rather than a request." Gov't. Br. 25 n.19.

quired to cooperate, she obviously believed she was required to cooperate, and in the circumstances of this case, that belief was not unreasonable. Respondent was only 22, and had not even graduated from high school (A. 13). She was stopped not just by one officer, but by two, which must have suggested to her that the government had more than a casual interest in obtaining answers to its questions. 3/ The officers identified themselves as "federal" agents. Whatever she knew or might have known of the authority of state agents, she might reasonably have believed that federal officers would have even greater authority to stop and question than would state officers. The officers were males, which to her, a black female, might well have seemed intimidating.

3/ The government appears to agree that the presence of "several" officers, at least if they were in uniform, would be more indicative of a "seizure" than the presence of one uniformed officer (Gov't. Br. 26).

We cannot know all the facts and factual nuances attending the event, but we do know, from their own admissions, that the officers intended all the while to restrain her if she attempted to walk away (A.19,21). That is an extremely significant admission, because that attitude was no doubt reflected in the officers' tone, language and gestures, all of which accurately communicated to respondent that she was not in fact free to leave.

After questioning respondent regarding her travels, and asking to see identification and her airline ticket, the officers took respondent to a locked, private DEA office for further questioning (A. 11-12).[4/] The government argues that this move to the DEA office was not more intrusive or coercive than the initial questioning, because the office was only 50 feet away.

4/ Although petitioner argues that questioning in a private office is less embarrassing to individuals than questioning in a public place, that is surely an option to be claimed or not by the individual not a "governmental" interest justifying the private interrogation of an individual.

That argument ignores the reality that it is more coercive to be questioned in the private, locked office of a law enforcement agency than to be questioned in a public concourse. Questioning in a locked DEA office is the substantial equivalent of custodial interrogation in a police station. By taking respondent to the DEA office for further questioning about herself, tne officers confirmed to her that she was the focus of an investigation of criminal activity.[5/]

Clearly, the stopping and questioning involved in this case was far more extensive and intrusive than the stopping and questioning that was found to constitute a "seizure" in Brown, Sibron, and Prouse.

5/The adversarial confrontation of the traditional Terry "stop" is to be distinguished from circumstances in which an officer seeks the cooperation of a non-suspect in the detection and prevention of crime. In sharp contrast to the suspects detained here and in Brown, cooperating non-suspects are not ordinarily required to produce identification, documents, and quick explanations of their activities. Such encounters do
(footnote continued on next page)

In these circumstances, including the fact that respondent was not told she was free to leave, her actions cannot be considered the "voluntary cooperation" referred to in Adams v. Williams, 407 U.S. 143, 146 n.1 (1972), or the benign conversation between police officer and the cooperating citizen referred to in Terry v. Ohio, supra, at 34 (White, J., concurring), where a person has a right to ignore his interrogator and walk

---

(footnote continued from previous page) not ordinarily assume an adversarial tone. Rather, cooperation is sought with respect to other parties and events. In those encounters, it may be clear that the person briefly stopped is not the focus of investigation, and he may, therefore, feel free to ignore the officer and walk away. By contrast, respondent, the focus of police investigation from the outset, was subjected to a classic adversarial Terry confrontation; "[a] brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information..." Terry v. Ohio, supra, at 21-22; Adams v. Williams, 407 U.S. 143,145-6 (1972).

away.[6]

6/The government in its brief submits that respondent voluntarily cooperated with their "request". (Gov't. Br. 26) But they ignore the critical distinction made by the very commentators they rely on, between seeking the cooperation of a non-suspect in the investigation or prevention of crime, and the stopping and questioning of suspects. The Model Code of Pre-Arraignment Procedure cited by the government at note 15 also makes this distinction explicitly. Section 110 entitles police to request cooperation from the citizenry at large, but requires the officer to make clear that no legal obligation exists to respond before questioning one he suspects of having committed a crime. See Model Code of Pre-Arraignment Procedure, §§110.1 (1),(2), at 3 (Proposed Official Draft) (1975). This provision formally recognized that suspects questioned in furtherance of a criminal investigation are overawed by official "requests". In this case, it is clear that respondent was a suspect and was approached as such. Thus,in the absence of a warning, it is reasonable to assume that a suspect unaware of her rights and overawed by an official request, views that request as a demand. Professor LaFave, also cited by the government (Gov't. Br. at 21 n.14, 24-5), would distinguish cooperation from a 'seizure' where a tone of voice or language indicating a demand rather than a request is used, or where an encounter would be viewed "as threatening and offensive even if coming from another private citizen". See generally 3 LaFave, Search and Seizure, A Treatise

(footnote continued on next page)

Perhaps recognizing that the stopping and questioning at issue in this case must be deemed a "seizure" under existing law, the government argues that an additional factor - "significant menacing conduct" accompanying an "on-the-street" interrogation and identification check - should be

---

(footnote continued from previous page) on the Fourth Amendment, §9.2 at 54 (1978). Certainly where two agents approach a suspect, require the production of several pieces of identification, and interrogate her, their request is more likely to be taken as a demand resulting in application of standards required in investigatory stops. The government's brief illustrates the difficulties inherent in making the question of whether a "seizure" took place turn on assumptions about the tone of voice used by the two federal agents. By inserting the word "politely" in their description of the way in which the agents "asked" for identification, they characterize the event as a non-seizure (Gov't. Br. at 26). Had the word "demandingly" or "impolitely" been inserted, presumably a seizure would be described. The better approach is to evaluate the situation keeping in mind the fact that even a skilled law professor can be "cowed" by an agent who "asks" for papers and explanations. See, e.g., Reich, "Police Questioning of Law Abiding Citizens", (footnote continued on next page)

required before an investigatory stop is termed a "seizure" (Gov't. Br. 24-5). But that factor was not present in Prouse, Brown, or Terry to any degree greater than in this case. The conduct of the officers in Brown, which constituted a "seizure", was less intrusive than the conduct here, which the government claims is not a seizure. 7/ The difference, the government

(footnote continued from previous page) 75 Yale L.J.1161 (1966). Viewed from this perspective, the disparity of authority between two federal agents asking for papers and other identification and engaged in the "competitive" activity of uncovering crime, and a young black woman, compels the conclusion that she was seized, notwithstanding the adverbs placed around the word "asked" to characterize the encounter.

7/Where Brown was asked simply to identify himself orally and explain why he was in an alley, Brown v. Texas, supra, at 360, respondent was approached by individuals who identified themselves as federal agents, and then demanded identification, an airline ticket, answers to several questions regarding her travels, and her presence in a private locked governmental office, some distance away, for further questioning. (A. 11-12).

suggests, is that Brown was "ipso facto seized" by a statute which made a refusal to give identification an offense (Gov't. Br. 24 n.18). But people are seized by police officers, not by statutes. Whether a "seizure" occurs turns on the nature of the intrusion, not on the existence or wording of a state law of which an individual may not even be aware.[8/] The circumstances of the intrusion in Brown and the instant case are indistinguishable.

Applying this Court's teachings, an overwhelming number of reported lower court decisions involving investigatory stops of travelers for identification by DEA agents suspecting narcotics trafficking have expressly held that such stops are "seizures" and require "reasonable

---

8/The existence of a state law authorizing a seizure may be relevant to whether an officer who executes that law will be immune from a suit for damages, but not to whether a seizure has or has not occurred.

suspicion".[9/]

9/See United States v. Andrews, 600 F.2d 563,567 (6th Cir.1979); United States v. Smith, 574 F.2d 882 (6th Cir.1978); United States v. Canales, 572 F.2d 1182,1186 (6th Cir.1978); United States v. Pope, 561 F.2d 663,668(6th Cir.1977); United States v. McCaleb, 552 F.2d 717,720(6th Cir.1977); United States v. Vasquez-Santiago, 602 F.2d 1069,1071(2d Cir.1979); United States v. Roundtree, 596 F.2d 672,673-4(5th Cir.1979) United States v. Oates, 560 F.2d 45,59 (2d Cir.1977); United States v. Ballard, 573 F.2d 913,915 (5th Cir.1978); United States v. Rogers, 436 F.Supp. 1,7(E.D.Mich.1976); United States v. Floyd, 418 F.Supp. 724,728 (E.D.Mich.1976); United States v. Westerbann-Martinez, 435 F.Supp. 690,696 (E.D.N.Y.1977); United States v. McClain, 452 F.Supp. 195,197 (E.D.Mich.1977); United States v. Allen, 421 F.Supp. 1372,1373 (E.D.Mich.1976); United States v. Van Lewis, 409 F.Supp. 535,542 (E.D.Mich.1976); United States v. Chamblis, 425 F.Supp. 1330,1332 (E.D.Mich.1977); United States v. Rico, 594 F.2d 320,326 (2d Cir.1979). See also United States v. Price, 599 F.2d 494 (2d Cir.1979)(question reserved but concurrance finds reasonable suspicion for a stop existed under the facts). Contra United States v. Elmore, 595 F.2d 1036,1042 (5th Cir.1979).

Assuming that the stopping and questioning in this case did constitute a "seizure", the Fourth Amendment standard by which its legality must be measured is not in dispute. The government concedes, and amicus agrees, that the officers were required to have reasonable suspicion that respondent was engaged in criminal activity before "seizing" her (Gov't. Br. at 26-27). See generally Brown v. Texas, supra at 362; Delaware v. Prouse, supra at 672; Terry v. Ohio, supra at 21. More precisely, the officers were required "to have a reasonable suspicion based on objective facts that the individual is involved in criminal activity". Brown v. Texas, 67 L Ed 2d at 362. As we now demonstrate, that reasonable suspicion was lacking here.

II. THE SEIZURE OF RESPONDENT WAS UNCONSTITUTIONAL BECAUSE IT WAS NOT BASED ON A REASONABLE SUSPICION THAT SHE WAS INVOLVED IN CRIMINAL ACTIVITY.

The government bears the burden of demonstrating, by means of objectively evaluable facts, that in the few minutes the officers had to observe respondent's behavior, while she hurried to catch a connecting flight at Detroit Metropolitan Airport, she sufficiently distinguished herself that a person of reasonable caution would reasonably have suspected her to be engaged in criminal activity. Brown v. Texas, 61 L Ed 2d at 362. To meet this burden, the government claims that the behavior the officer observed did give rise to reasonable suspicion, and that the correlation between respondent's behavior and the unwritten "drug courier profile" used at that airport [10/] is a

---

10/Each airport maintains "its own set of drug courier characteristics." There is "no national profile." Even the local profiles are "not rigid" but are "constantly modified." Gov't. Br. 31,n.23. Thus, individuals exhibiting precisely the same characteristics might be stopped at

(footnote continued on next page)

"significant" consideration in determining whether the government has carried its burden of proof (Gov't. Br. 31). Because the facts compel the conclusion that the behavior which the agents observed, and on which they based their suspicion, is indistinguishable from that of hundreds of thousands of domestic air travelers, and does not constitute reasonable suspicion, the inclusion of those behaviors in an unwritten, ad hoc "profile" cannot create reasonable suspicion.

The government's argument is difficult to understand, and apparently self-defeating. The government appears to concede that matching one or more of the characteristics of the local drug courier profile will not constitute either "probable cause" or

---

(footnote continued from previous page) the airport in Detroit, but not at the airport in Chicago. Similarly, identical characteristics might subject an individual to questions at the Detroit airport in May, but not in June.

"reasonable suspicion" of criminal activity.[11] There must be something more. The "more", in the government's view, is the "correlation" or "coincidence" between the characteristics observed by the officers, and the inclusion of those same characteristics in the local drug courier profile.[12] In the government's

---

11/Gov't. Br. 31 ("[a]lthough we have never suggested that 'the drug courier profile, in itself,' automatically constitutes either a standard of probable cause or of reasonable suspicion - the reasonableness of a stop must always be measured by the totality of the facts - we do contend that a correlation of observed facts with the drug courier profile should not be disregarded, but is in fact a significant and legitimate consideration in determining the permissibility of a stop. The failure of the court of appeals to give due consideration to coincidence with the profile may stem from a misunderstanding of its nature and function").

12/The government stressed that "[i]n addition, several of the facts observed by the agents coincided with 'the drug courier profile' "(Gov't. Br. 30).

view, a "high coincidence between observed facts and profile characteristics can be quite significant." (Gov't. Br. 32) Apparently, this coincidence is enough to establish reasonable suspicion even if the profile itself is not. That is a circular argument. If the profile does not constitute reasonable suspicion, as the government seems to acknowledge, the fact that respondent's behavior matched the profile cannot constitute reasonable suspicion. If the government had evidence of criminal activity other than behavior included in the profile, the fact that the individual also met the profile could at least arguably heighten the level of suspicion sufficiently to constitute reasonable suspicion.[13/] For example, if

---

13/ Amicus would urge a different conclusion, but the point is at least arguable. In any event, the relevance of a profile in those circumstances is not presented by the facts of this case, and need not be decided to resolve the issue presently before this Court.

agents in Detroit received a telephone tip from a reliable informant in Los Angeles that an unnamed, young, white male in a camel overcoat would be arriving in Detroit on a particular flight and would be carrying drugs, and if ten persons meeting that description got off the plane, the fact that one of them was the last to leave the plane, carried no luggage, and met other characteristics of the profile, could at least arguably create a sufficiently reasonable suspicion of criminal activity, in connection with the tip, to justify stopping and questioning that individual.

But that is not what happened in this case. Here, every behavior relied upon by the officers to constitute reasonable suspicion was a behavior that was included in the drug courier profile. The profile was not "in addition" to other information; it was the only information. Thus, under the government's own analysis, the facts in this case should be deemed insufficient to constitute reasonable suspicion.

Assuming the government will change its position and will argue, as it has not to date, that matching a drug courier profile

"in itself" constitutes reasonable suspicion, amicus will show that such profiles do not, of themselves, constitute reasonable suspicion, and certainly cannot constitute reasonable suspicion where, as here, other information known to the agents negated any suspicious inferences that could otherwise be drawn.

The facts disclose that respondent's behavior was completely normal and similar to that of any other domestic traveler in the Detroit Metropolitan Airport. Compare Brown v. Texas, supra; Delaware v. Prouse, supra. Moreover, the record discloses that the agents deliberately ignored information uncovered through their surveillance which negated even their marginal grounds for suspicion.

When respondent stepped off her American Airlines flight at Detroit Metropolitan Airport, the agents had no prior information about her, and no information suggesting an imminent incident of drug trafficking (A. 49). Their attention was drawn to respondent solely because she arrived on a flight from Los Angeles, was last to exit the plane,

and was thought to appear nervous (A.9, 12, 14, 15). When she did not claim luggage immediately, but proceeded instead to obtain a boarding pass from Eastern Airlines for its next Pittsburgh flight, she was stopped by the agents (App. 38).

The government, in its brief in the Sixth Circuit, claimed that respondent's behavior was "activity not normal for law-abiding citizens." (Gov't. 6th Cir. Br. 16). However, to the layman and even to the "trained experienced police officer who is able to perceive and articulate meaning in conduct which would be wholly innocent to the untrained observer," Brown v. Texas, supra, at 362 n.2, this behavior bespeaks nothing but innocent conduct.

First, the government claims significance in the fact that respondent arrived in Detroit on a flight from Los Angeles. This was deemed suspicious because Los Angeles "is the primary source city for heroin coming into Detroit" (A. 9-15). However, even were it assumed, arguendo, that passengers deplaning from Los Angeles could reasonably be suspected of carrying

drugs into Detroit, upon observing respondent, the agents learned that she was making an immediate connecting flight to Pittsburgh (A. 10,11,17). Since she could not be suspected of bringing narcotics into Detroit if she was immediately going on to Pittsburgh, this extremely tenuous ground for suspicion disappeared. In any event, travel from Los Angeles can hardly be regarded as suspicious:

> Los Angeles may be a major narcotics distribution center, but the probability that any given airplane passenger from that city is a drug courier is infinitesimally small. Such a flimsy factor should not be allowed to justify - or help justify - the stopping of travelers from the nation's second largest city. United States v. Andrews, 600 F.2d 563 (6th Cir. 1979).

An analogous argument was made by Puerto Rican authorities last term, who contended that persons arriving in Puerto Rico from the mainland were likely to be drug couriers. That argument was sharply rejected by this court. Torres v. Puerto Rico, 47 U.S.L.W. 4716, 4717, 4719 (June 18, 1979); Cf. Ybarra v. Illinois, supra, at 4025 (mere pre-

sence in bar subject to search warrant for narcotics not grounds for belief that individual is involved in drug traffic); Sibron v. New York, supra, at 62 (talking to narcotics addicts for eight hours not ground for inference that one is trafficking in narcotics); Brown v. Texas, supra, at 362-3 (being in a neighborhood frequented by drug users is not a basis for concluding that a person was engaged in criminal activity); United States v. Brignoni-Ponce, 422 U.S. at 885-6 (even though there is a substantial likelihood that a person of Mexican ancestry found near the border will be an illegal alien, Mexican appearance does not justify an investigative stop), Delaware v. Prouse, supra (driving a car not a basis for concluding that driver is violating any traffic safety regulations).

Furthermore, the government claims that its "source city" designation is an element of its "drug courier profile." (A. 9,10: Gov't. Br. 30) However, the Sixth Circuit, which, judging from the reported cases, has decided more cases concerning DEA investigative stops than any other circuit (see cases Point I n.9 supra),has indicated in a very recent

decision that this "source city" designation is manipulated by DEA agents to fit the city of origin of anyone it stops and searches. See United States v. Andrews, supra, at 566-7 ("our experience with DEA agents' testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center").

Other facts which suggested the innocence of respondent's behavior were overlooked. The agents attached significance to the fact that respondent claimed no luggage upon her departure from the airplane (A. 8,10). Yet they found out a few moments later that she was changing airlines to reach her final destination (A.10). Accordingly, the suspicious inference that she had no luggage was improper because presumably the luggage was being transferred for her, as the agent

testified at the suppression hearing (A.16,17).[14/] The agents accorded significance to the fact that respondent changed airlines in Detroit, drawing the inference that she was evading law enforcement surveillance (A.11). However, despite the fact that the agents had been working at Detroit Airport for a long time (A.7), neither possessed sufficient

---

14/Although the government asserts that respondent had been "booked on American Airlines from Los Angeles through Detroit to Pittsburgh", and that when she attempted to change her booking to an Eastern flight she made no inquiries about transfer of her luggage from American Airlines, those "facts" find no support in the record. (Gov't. Br. 29). As the Airline Guide makes clear, respondent could not have been "booked on" a connecting American Airlines morning flight from Los Angeles to Pittsburgh with a stop in Detroit, for there was no such flight; she could only have been "booked through" or "ticketed on" American Airlines, with actual Detroit-Pittsburgh passage on another airline. See n. 15, infra. Nor did any person testify that respondent failed to inquire "about...arrangements for the transfer of any luggage from the American or Eastern flight (A.11)". Gov't. Br. at 29. The record is silent on whether she made such inquiries.

information to distinguish a change of airlines which is an evasive tactic, from those innocent changes which are made by many thousands of travelers each day due to the exigencies of flight scheduling (A.17).[15/]

The good faith of the agents in asserting that respondent's "transfer of airlines" was a profile ground for suspicion is also

---

15/A simple check of the flight schedules for the day respondent was stopped would have shown the agents that her decision to fly to Pittsburgh via Detroit, where she was to connect with an Eastern Airlines flight, was the efficient (and thus non-suspicious) means of reaching Pittsburgh after an early morning Los Angeles departure. The "North American Official Airline Guide," (the "Guide"), issue of February 1, 1976, shows the earliest direct flight to Pittsburgh from Los Angeles to be a 10:00AM Eastern flight. See "Guide", supra, at 711-12. Respondent deplaned in Detroit at approximately 6:25AM (A.8), indicating that she left Los Angeles at an hour when direct flights to Pittsburgh were not available. The guide further indicates that American Airlines, the airline respondent flew to Detroit, had no connecting flight to Pittsburgh, see Guide, supra, at 709. It therefore appears that respondent, who arrived in Detroit at 6:25AM and obtained a boarding pass for an Eastern Airlines shuttle to Pittsburgh, intended to take the 7:00AM Eastern flight, the earliest connecting
(footnote continued on next page)

doubtful. This characteristic does not appear to have been relied on by the government in other "profile" cases. And it conflicts with testimony given by DEA agents in other cases that the profile includes taking direct flights from specified cities. See,e.g., United States v. Floyd, supra, 418 F.Supp. at 25. See also United States v. Chamblis, 425 F.Supp. at 1333 (agent candidly admits that "the profile in a particular case consists of anything that arouses his suspicions").

Trained officers have an obligation to consider information that would negate suspicion, even if lay persons would not even notice that information. Accordingly, trained officers should have less leeway than lay persons to read suspicion into behavior which, due to their job and special knowledge, they should recognize to be innocent:

(footnote continued from previous page)

flight available. See Guide, supra, at 709. Since this change was required to reach Pittsburgh expeditiously, this change of airlines was entirely reasonable.

> [C]ourts have long accepted the fact that the training and experience of police may equip them to reach conclusions different from those of a layman. This factor, of course, cuts two ways: An officer because of his training and experience may be held to have probable cause when a layman confronted with the same facts would not; or he may for this reason not be entitled to mistakes which would be reasonable for a layman, and thus not have probable cause. (Emphasis added, footnotes omitted.) LaFave, "Street Encounters and the Constitution: Terry, Sibron, Peters, and Beyond," 67 Mich. L.Rev. 39, 70, 71 (1968).

The experienced diligent officer,[16/] careful to respect constitutional limitations and avoid unjustifiable intrusions into the privacy of the traveling public, should take reasonable steps to acquaint himself with facts which might eliminate the suspicion relied on by the government for this investigatory stop.

16/Agent Anderson had over ten years experience with DEA (A.7).

As another element of suspicion, the agents cited the fact that respondent was the last person to exit the aircraft. This is no unusual event; someone is last on each of the thousands of domestic flights each day. Compare Brown v. Texas, supra, at 362 ("[t]here is no indication in the record that it was unusual for people to be in the alley"). Being last may well be fortuitous, depending on seating arrangements, the position of doors, or the haste of forward passengers to depart. Many passengers believe the rear-most seats are the safest, or the quietest. In addition, the rationale for suspecting the "last-out" - that the person can observe the area to detect agents (A.9) - is weak. Any position in the latter part of the line would satisfy this purpose and would avoid the attention of being "last out." Oddly, no other case could be found in which the existence of this characteristic was asserted (much less applied) by DEA agents. See United States v. Westerbann-Martinez, 435 F.Supp. at 98 (catalogue of profile characteristics asserted in various cases). If this objective and readily observable characteristic were more than tenuous guesswork and were routinely applied,

it would be expected to have surfaced elsewhere in the extensive litigation over the DEA drug courier program.

In addition to these more objective characteristics, the agents also alleged that respondent's "nervousness" was cause for suspicion (A.14). That is an extraordinarily subjective determination and therefore subject to arbitrary application. But even if respondent was nervous, to the layman and the skilled observer alike, "nervousness" aptly describes common airport behavior. Even if nervousness in a context where there is no cause for nervousness may be unusual and may give rise to reasonable suspicion if supported by other indications of criminal conduct, when an individual is perceived to be nervous in a context which commonly induces nervousness in normal law-abiding persons, that individual is not unusual and his or her nervousness should not cause a person of reasonable caution to investigate further. See, e.g., Brown v. Texas, supra, 61 L.Ed. at 362 ("[t]here is no indication in the record that it is unusual for a person to be in the alley"). Nervousness is entirely

consistent with innocent behavior at airports where tight business itineraries may be dashed by missing a flight or by a flight scheduling change, or where a traveler may be anticipating a long-awaited rendezvous with friends or family. Many airline passengers are nervous simply because they are afraid of flying. See United States v. Andrews, 600 F.2d at 566; United States v. McCaleb, 552 F.2d at 720; United States v. McClain, 452 F.Supp. at 200 n.3. It is difficult to imagine a more common description of airline passenger behavior than nervousness.[17/]

17/The government appears to argue the nervousness factor in any way that supports a particular search. Compare United States v. Himmelwright, 551 F.2d 991,992 (5th Cir. 1977) (government argues that it was suspicious that a woman was excessively calm while going through customs). See also United States v. Escamilla, 560 F.2d 1229, 1233 (5th Cir. 1977) (court noted that at times the government argues that it is suspicious for the occupants of a vehicle in the border zone to react nervously when a patrol car passes, while at other times the government argues that it is suspicious if the occupants just look at the road and do not acknowledge the patrol car).

To "nervousness" the agents add their final observation before seizing respondent: she scanned the passenger area when she departed the plane (A.9). "Looking around" the passenger area, even nervously, could not be grounds warranting an investigatory stop, or anyone who shows the slightest discomfort on deplaning, and then scans the passenger area for an expected relative or friend, would be subject to a Terry stop.

In short, separately and together, the factors the government relies upon for its claim that the investigatory stop of respondent was founded on reasonable suspicion point only to innocence. The knowledge that a young woman deplanes last from Los Angeles, glances around, appears nervous, and does not pick up her luggage on her way to obtain a boarding pass for an expeditious connecting flight on another airline to her destination in Pittsburgh, falls far short of the articulable and reasonable suspicion the Court has consistently required as a constitutional minimum for a Terry stop.

Like the defendant in Brown, respondent's activity was "no different from the activity of other pedestrians in th[e] neighborhood."

Brown v. Texas, supra, at 363. Her innocent-seeming behavior, buttressed by other observed facts which should have negated even a highly suspicious observer's inference that criminal activity was afoot, was far more innocent than that observed and found not to give rise to reasonable suspicion in Sibron v. New York, 392 U.S. at 62 (officer observed Sibron talking to known narcotics addicts over an eight-hour period), and Terry v. Ohio, supra.[18/]

Reasonable suspicion would exist to stop almost any airline passenger if the facts in this case constitute reasonable suspicion. Indeed, the "drug courier profile" appears to be designed to accord

---

18/"Two men hover about a street corner for an extended period of time...; where these men pace alternatively along an identical route, pausing to stare in the same store window roughly 24 times, where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away." Terry v. Ohio, supra, 392 U.S. at 23.

the agent very broad discretion to stop almost anyone.

The profile is not selective. It is a dragnet of characteristics. It does not consist of fixed characteristics, but rather, as one judge observed, "has a chameleon-like quality; it seems to change itself to fit the facts of each case." United States v. Westerbann-Martinez, 435 F.Supp. at 698. It is not written, [19]

19/ The efficacy of the profile is seriously undermined by the fact that its criteria are reported in case law; since no effort has been made by the government to keep the profile "under wraps", couriers may now fabricate an acceptable profile. See United States v. Lopez, 328 F.Supp. 1077, 1086 (E.D.N.Y. 1971)(Weinstein, J.)(government request for in camera investigation of hijacker profile granted to avoid dissemination of its contents); United States v. Slocum, 464 F.2d 1180 (3d Cir.1972)(same); United States v. Bell, 464 F.2d 667,670 (2d Cir.1972)(same); United States v. Westerbann-Martinez, 435 F.Supp. at 699, ("[w]hen it becomes known that looking around will justify a conclusion of nervousness which in turn may justify an investigative stop, narcotics couriers will then deplane and proceed to their destination without looking around. At that point, the government will presumably argue that people who look straight ahead after deplaning are subject to investigative stops.")

nor is it the product of official guidelines (Gov't. Br. 4 n.4, 31 n.23). As one agent candidly admitted, "the profile in a particular case consists of anything that arouses his suspicions." United States v. Chamblis, 425 F.Supp. at 1333[20/]

20/This observation is borne out by the variety of "profile" factors purportedly relied on by agents in cases that have been litigated. Among these factors are: (1)being the last person to deplane: United States v. Mendenhall, No.6-8028 (E.D.Mich. Nov. 18, 1976); (2)short stays and direct flights to and from certain cities: United States v. Westerbann-Martinez, supra; United States v. Van Lewis, supra; (3)use of small or large bills to purchase tickets: United States v. Craemer, 555 F.2d 594 (6th Cir. 1977); United States v. Pope, supra; (4)use of light weight luggage: United States v. Chamblis, supra; (5)no one to pick up person at airport: United States v. Chamblis, supra; (6)glancing around terminal on exit from plane: United States v. Mendenhall, supra; United States v. Westerbann-Martinez, supra; (7)not having an FAA required name tag on luggage: United States v. Allen, supra; (8)not having a ticket folder: United States v. Allen, supra; (9)attempting to hide fact that people are traveling together: United States v. Floyd, supra; (10)hiding fact that someone is waiting: United States v. Floyd, supra; (11)person's appearance non-conducive to the manner in which they were

(footnote continued on next page)

Moreover, the government has not kept records to show which "factors" have proven successful predictors, or which would permit validation and accurate

---

(footnote continued from previous page) flying: United States v. Westerbann-Martinez, supra; (12) return to point of departure with same clothes on as at time of departure: United States v. Van Lewis, supra; United States v. McCaleb, supra; (13) changing planes or airlines: United States v. Mendenhall, supra; (14) traveling under an alias: United States v. Van Lewis, supra; United States v. McCaleb, supra; (15) making a phone call immediately after arriving at the airport: United States v. Chamblis, supra; (16) round trip ticket to drug distribution center: United States v. Craemer, supra; (17) use of empty luggage: United States v. Craemer, supra, United States v. Van Lewis, supra; and (18) exiting at upper level where there is no public transportation: United States v. Chamblis, supra.

refinement of the profile in accordance with accepted statistical methods. There are no studies of the percentage of travelers the profile is likely to fit, or records of how frequently individuals have been interrupted by a stop for questioning and the production of documents, but have not been searched or arrested. And there are no records of the number of searches where no contraband was found.[21/] In short, after

---

21/The government offers only the most self-serving and misleading statistics imaginable, admitting that "accurate comprehensive statistics have not been kept" but claiming nonetheless that "records" indicate success because "controlled substances were found in 77 of the 96 encounters." (Gov't. Br. 32 n.24 quoting testimony recited in United States v. Van Lewis, 409 F.Supp. at 539.) The "96 encounters" include only those investigatory stops which were followed by either a consent search where contraband was found or a non-consensual search. Supplemental Appendix for Appellants at 1, United States v. Mendenhall, 596 F.2d 706 1979). Thus, the government's records are deficient in four respects. First, there is no record of the number of investigatory stops which did not lead to searches. This data would indicate how accurate the profile is and the extent to which it licenses intrusions on law-abiding travelers. Second, there is no evidence that the recorded "en-

(footnote continued on next page)

several years of experience, [22] there is still no way to determine the validity of

---

(footnote continued from previous page) counters" resulted purely from application of the "profile". Many reported cases appear to turn on application of the profile but actually involved independent evidence such as tips, contacts from other police units, extensive outside surveillance or prior knowledge of the suspect as a drug trafficker. See, e.g., United States v. Canales, 572 F.2d 1182 (6th Cir. 1978); United States v. Oates, 560 F.2d 45 (2d Cir. 1977). Since the records do not indicate how many "successes" were solely the result of application of the profile, they do not tell us anything about the accuracy of the profile. Third, since the profile is not applied rigorously such that any traveler who fits the profile must be stopped, but rather is applied at the discretion of the agent, (see discussion Section II infra), the data does not tell us how many people the "profile" fits. In determining the accuracy of the "profile", it is important to know how often it applies, but this information is unavailable because the agent does not effect a "stop" when he or she decides, for any number of reasons, not to rely on the profile. Fourth, the records do not include the number of stops followed by consent searches where no contraband was found - a further indication that the records are self-serving rather than accurate.

22/The DEA airport surveillance program has been in operation since 1974 (Gov't. Br. 2).

the "profile" because there is no evidence of its failures: only its successes have conveniently been recorded. 23/

There is another, even more important flaw in the profile - it is applied or not in the complete discretion of the officer in the field. The Court has repeatedly emphasized that the Fourth Amendment requires safeguards to assure that the individual's reasonable expection of privacy is not "subject to the discretion of the official in the field." Camara v.

23/ Cf. United States v. Lopez, 328 F.Supp. 1082, 1084-86 (hijacker profile designed by Task Force involving several agencies and individuals skilled in psychology, law, engineering, and administration who made a detailed study of all then known hijackers and of the air traveling public, and all possible care taken to determine the statistical probability that an individual would satisfy the profile, and careful records kept to determine the number of persons who were stopped and subjected to a weapons search as a condition for boarding the plane, but who had no weapons); State v. Ochoa, 112 Ariz. 582,544 P.2d 1097 (1976)(profile for the detection of stolen vehicles being transported to Mexico developed through detailed analysis of 10,000 vehicle thefts in the Phoenix area in a 17 month period).

Municipal Court, 387 U.S.523,532 (1967); Marshall v. Barlow's, Inc., 436 U.S.307, 320-2(1968); United States v. United States District Court, 407 U.S. 297,322-3 (1972); Delaware v. Prouse, supra, 59 L.Ed. 2d at 668-69; United States v. Brignoni-Ponce, 422 U.S. at 882; Brown v. Texas, supra, at 362; United States v. Martinez-Fuerte, 428 U.S.543,554 (1976). In applying this profile, agents pick and choose among the many it describes and determine who will or will not be "seized". See Pet. for Cert. 17-18 n.17. ("The basic purpose of the profile is to inform, but not to serve as a substitute for the agent's judgement in particular circumstances"). The introduction of uncontrolled, arbitrary, and standardless discretion transforms the assertedly discretion-reducing profile into a screen for the arbitrary exercise of governmental power. [24/] A particular DEA agent may stop

---

24/Cf. United States v. Lopez, supra, at 1101 ("the procedure instituted to detect hijackers...survives constitutional scrutiny only by its careful adherence to absolute objectivity and neutrality)(discretionary introduction of ethnic and other criteria by personnel rendered the system constitu-

(footnote continued on next page)

only the blacks and hispanics who meet the profile. Only women may be stopped by another agent, and a third may stop only the shabbily attired, and let the well-to-do go by. Discrimination made possible by the "chameleon-like"nature of the drug courier profile and the discretionary manner in which it is applied, is precisely what the Fourth Amendment was designed to prevent. 25/ Even in circum-

---

(footnote continued from previous page) tionally impermissible and required suppression). See also Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process," 84 Harv. L.R. 1329, 1331 (1971)(pointing out that even a sound, statistically validated system can be abused by ignorant, careless or malevolent personnel).

25/Compare Papachristou v. City of Jacksonville, 405 U.S. 156,170 (1972)("Where...there are no standards governing the exercise of the discretion granted by the ordinance the scheme permits and encourages an arbitrary and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure").

stances not applicable here, where investigatory stops may be permitted on less than reasonable suspicion, the neutral and discretion-free application of objective criteria is required. See Delaware v. Prouse, supra, at 674 (Blackmun and Powell, JJ., concurring); United States v. Martinez-Fuerte, supra, at 559 (fixed border checkpoint minimizes discretion by field officer.) 26/

26/ Courts and commentators have questioned permitting any use of mathematical methods of "profiling" and "validation". See, e.g., Tribe, "Trial by Mathematics: Precision and Process", 84 Harv.L.Rev. 1329,1333-4 (1971). Where public dnager is great, as in the case of air piracy, there is arguably a greater need for application of these methods due to the threat to human life, the orderly operation of air commerce, and the stability of international relations. Given the public interest at stake and the absence of alternative means of stopping air piracy, reasonableness within the meaning of the Fourth Amendment might permit less factual justification and some reliance on statistical methods, although amicus would argue otherwise. See Amsterdam, "Perspectives on the Fourth Amendment", 58 Minn. L.R. 349,390-2 (1974). Cf. United States v. Brignoni-Ponce, supra, at 878 (the reasonableness of a seizure

(footnote continued on next page)

Finally, no significance can be attached to the profile because it is the agent who determines its content. See Pet. for Cert. 17-18 n.17("profile is not rigid, but is constantly modified in light of experience," and applied according to "the agents' judgement"). Thus, there is an identity in each case between the profile characteristics and the agent's observations; the profile is merely redundant of what has aroused the agent's suspicion. By admitting that no fixed objective standard exists, the government asks the court to accord significance to a profile which consists of nothing more than the subjective determinations of the agent.

(footnote continued from previous page) that does not require probable cause "depends on a balance between the public interest and the individual's right to person security"). But drug trafficking does not present a threat of similar magnitude or immediacy. Therefore, there is no justification for the use of a profile, much less an unvalidated profile, as grounds for the investigatory stop in this case.

Ruling that the use of this profile, without more, will not constitute reasonable suspicion, will not prevent DEA agents from enforcing the law. In United States v. Canales, 572 F.2d 1182 (6th Cir. 1978) and United States v. Oates, 560 F.2d 45 (2d Cir. 1977), careful investigations led to investigatory stops which were upheld by the Sixth and Second Circuits, respectively. 27/

27/In Oates, the DEA agent had personal knowledge that defendant was a major narcotics dealer. He boarded the plane with the defendant and noted that defendant and his traveling companion took seats in different sections of the plane. Id. 50. The companions rejoined on arrival in New York and were joined by a third man known by the agent to be associated with the drug culture in New York City. Although the flight had arrived at 10:00PM, the travelers were observed waiting for a return flight to Detroit at 7:00AM the following morning, and one of them had noticeable bulges under his clothing which had not been present on the arriving trip. Id. 51. Only at the conclusion of this competent police work were defendants stopped for questioning.
(footnote continued on next page)

That the questioning and subsequent search in this case did reveal narcotics does not justify the officers' actions. See United States v. Watson, 423 U.S. 411, 455-56 n.22 (1976)(Marshall, J., dissenting)(hindsight should not color the reasonableness of a search or seizure), quoted in United States v. Martinez-Fuerte, 428 U.S. 543,565 (1976). The validity of the stop must be assessed by examining whether the facts then available to the agents amounted to "reasonable suspicion" sufficient to justify the forced stop for questioning. Based on the record, it is plain that no reasonable suspicion existed.

(footnote continued from previous page) In Canales, defendant was already suspected of narcotics trafficking by state police and DEA agents in both Detroit and Texas. He was tracked by Texas DEA agents to a bar in Mexico known for narcotics trafficking, and Detroit agents were put on alert when he boarded a return flight from Texas. Id. 1184.

III. RESPONDENT'S ALLEGED CONSENT TO A STRIP SEARCH WAS NOT VOLUNTARY, AND WAS INVALID AS A "FRUIT" OF AN ILLEGAL DETENTION. ACCORDINGLY, EVIDENCE OBTAINED IN A SEARCH IMMEDIATELY FOLLOWING UPON HER ILLEGAL INVESTIGATORY STOP MUST BE SUPPRESSED.

Assuming, as we have just demonstrated, that the investigatory stop of respondent was illegal, then - absent consent - a search incident to that arrest also violated the Fourth Amendment, and evidence seized in such a search would be subject to exclusion at trial. See, e.g., Sibron v. New York, 392 U.S. 40 (1968); Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 60 L Ed 2d 824 (1979).

The government argues that respondent validly consented to the search, and that such consent sufficiently purged the taint of illegality. However, consent was not freely given under the standards of Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Moreover, it was obtained by improperly exploiting an illegal detention. See Brown v. Illinois, supra.

1. There was no voluntary consent to search. The Court has frequently held that the normal sense of obligation to defer to

authority negates a finding of "voluntary" consent to a search. See, e.g., Johnson v. United States, 333 U.S. 10, 13 (1948) (consent following agent's approach to house and statement of authority to search not voluntary); Amos v. United States, 255 U.S. 313, 317 (1921) (consent following agent's approach and statement of intention to search not voluntary). The facts in this case show that respondent's consent was not voluntary.[28/]

28/ The agents' single-minded determination to overbear respondent and gain her consent is demonstrated by their disregard of factors which, according to their later testimony, should have led them not to stop respondent in the first place. All that the agents knew of respondent when they fixed their attention on her was that she was young, black, a woman, and was last to leave a plane from Los Angeles (A.9). Although agent Anderson claimed respondent's failure to claim luggage was a factor in leading him reasonably to suspect her of criminal activity, he did not let the knowledge that she was making a connecting flight and, therefore, would not be claiming luggage, mute his eagerness to have his suspicion aroused. He was suspicious because she arrived from Los Angeles, a major "source" of narcotics coming into Detroit, but he did not let the knowledge that she was continuing on to Pittsburgh and would not stop in Detroit assuage his suspicion. He suspected her of an effort

(footnote continued on next page)

The prosecution carries the burden of showing that consent to a search is voluntary, and that burden cannot be carried by showing no more than acquiescence to a claim of authority. Bumper v. North Carolina, 391 U.S. 543, 548, 549 (1968); Johnson v. United States, supra, at 13. To determine whether consent is an act of submission or of self-will, the Court looks at the totality of circumstances "to assess the psychological impact on the

---

(footnote continued from previous page)
to evade law enforcement officers because she was transferring airlines. Yet extensive experience in the Detroit Airport had not led him to acquire an "Airline Guide" which easily revealed both the absence of a connecting flight to Pittsburgh on the airline on which she traveled to Detroit, and that the transfer she was making was an expeditious (and, therefore, nonsuspicious) connection due to the absence of direct flights to Pittsburgh from Los Angeles at that hour. See supra Point II. Nor was his skepticism mitigated when she produced accurate identification upon request (A.18), because he intended to continue to detain her regardless of the identification she produced (A.19). Nevertheless, even though the agents' marginal grounds for suspicion were mitigated at each point by evidence betokening not crime but innocence, they relentlessly pursued their adversarial confrontation with respondent to gain what she eventually gave them under duress--a search of her person.

accused, and evaluate the legal significance of how the accused reacted." Schneckloth v. Bustamonte, supra, at 226.

Here, two agents interrupted the scheduled movement of a young black traveler, ignored the identification she produced at their demand, paid no attention to her explanation of her travels, disregarded for no apparent reason wholly innocent explanations for the few acts they saw as somehow "suspicious," and without explanation removed her to a locked, private, law-enforcement office (A. 12, 19). This entire course of conduct was directed at communicating to her what was concededly their intention--to get the evidence they wanted no matter what she did. By approaching her, identifying her, questioning her, and removing her, the agents indicated that they intended to secure evidence from her.

Even though respondent repeatedly requested her freedom, by stating that she had a plane to catch, thereby manifesting her desire to terminate her detention (A. 24, 27), they continued to detain her. In short, they proceeded so that when it came time to obtain their goal of searching her, she would acquiese because she thought she had no choice. Their action was tantamount to implying the authority of a warrant to search her.[29/] Cf. Bumper v. North Carolina, supra (consent procurred by representation of possession of a valid warrant is involuntary).

29/ The extent to which respondent was manipulated into consenting to a strip search can be understood by imagining the rage one would feel were a policeman to approach and ask for consent to strip search. Consent would be even less likely to be forthcoming from one who had contraband concealed on her person. This is not to say that concealment of contraband renders consent to a strip search impossible, but such consent is improbable, and the government bears a correspondingly greater burden in demonstrating that the improbable has occurred.

Respondent was not asked for consent "on-the-street" where she could still have entertained the thought of walking away. In such public places, reprisal for refusing consent is less likely because the public may well observe and report on any such retaliation. See, e.g., United States v. Watson, 423 U.S. 411, 424 (1976) (public place); Schneckloth v. Bustamonte, supra (same). Respondent was isolated, removed from the passing public, and placed behind a locked door at the culmination of a series of unlawful invasions of her privacy and autonomy. Nor was respondent at liberty when she consented. Because the "inherent compulsion in custodial surroundings" works on free will, see

Miranda v. Arizona, 384 U.S. 436, 450 (1966), it is not reasonable to infer that consent is a product of free will when one's freedom is restrained by governmental officials. Cf. Wong Sun v. United States, 371 U.S. 471 (1963) (unreasonable to infer that incriminating statement was sufficiently the product of free will after unlawful seizure); Schneckloth v. Bustamonte, supra (implying that consent will be harder for state to demonstrate if individual is in custody).

Given the predictable effect of the agents' unrelenting unlawful action, respondent's consent under these circumstances to a humiliating strip search cannot be considered voluntary.

2. The Court of Appeals rested its decision primarily on the ground that there was no "valid consent to search," United States v. Mendenhall, 596, F.2d at 706.[30/] Amicus

---

30/ The government's claim that the Court of Appeals disregarded the "totality of all the circumstances" rule of Schneckloth, relying instead on a per se rule, is wholly unjustified. The Mendenhall Court followed its analysis in McCaleb, a case carefully applying the Schneckloth rule and examining
(footnote continued on next page)

has demonstrated that that ground is correct: consent was not freely given, and accordingly the judgement below must be upheld. As the government concedes, however, even if respondent voluntarily "consented" to the strip search, the fruits of the search would still be subject to exclusion if the search was so closely connected to the "primary illegality" of the detention that it is a "fruit" of a "poison tree" under Brown v. Illinois, supra.

Based on the factors canvassed in Brown and succeeding cases, it is clear that the taint from the illegal detention was not sufficiently attenuated to justify admitting the evidence seized pursuant to the search.

Here there were no intervening circumstances, aside from a warning of the right to refuse consent, which could have dissipated the effect of the illegal stopping and questioning. The agents admitted that they would have detained respondent if she

---

(footnote continued from previous page) the totality of the circumstances in assessing voluntariness. See United States v. Mendenhall, supra, at 707, citing United States v. McCaleb, 552 F.2d 717, 721 (1977).

had attempted to leave, and they engaged in a swift and escalating course of conduct designed to uncover the evidence they sought. Compare Brown v. Illinois, 422 U.S. at 605 ("[t]he detectives embarked upon this expedition for evidence in the hope that something might turn up"); Dunaway v. New York, 60 L Ed 2d at 838 (same). To hold the investigatory stop unconstitutional, but to admit the evidence thereby secured, would render the ruling that the stop was illegal a "mere form of words." Officers could effect illegal investigatory stops with impunity, encouraged by the knowledge that if able to procure "consent" to a search, evidence derived therefrom would be admissible at trial. Cf. Brown v. Illinois, supra, at 602, 603 (constitutional guarantee would be reduced to "a form of words" if intervening Miranda warnings were viewed as a "cure-all"); Dunaway v. New York, supra, at 840 (same).

If mere warning of the right to refuse consent to a search were held to attenuate the taint of an unconstitutional seizure, "the effect of the exclusionary rule would be substantially diluted." Brown v. Illinois, supra, at 602. The evidence here should therefore be excluded.

CONCLUSION

The judgement of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

Charles S. Sims
Bruce J. Ennis, Jr.
Edna D. Wells
Helene M. Freeman
c/o American Civil
Liberties Union
Foundation, Inc.
22 East 40th Street
New York, N.Y. 10016

Attorneys for Amicus Curiae*

Dated: December 18, 1979
New York, New York

* Counsel gratefully acknowledge the substantial assistance of Jed Ringel, a third-year law student at New York University School of Law, in the research and preparation of this brief.